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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 48

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR SYDELLE PRICE

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INDEX

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE LEGISLATIVE HISTORY OF SECTION 272(a) AND (d), INTERNAL REVENUE CODE OF 1939	5
II. THE LANGUAGE OF SUBSECTIONS (a) AND (d) OF SECTION 272, INTERNAL REVENUE CODE OF 1939	12
III. APPLICABLE CASE LAW	13
Mutual Lumber Co. v. Poe	13
McCarthy Co. v. Commissioner	16
East Bay Water Co. v. McLaughlin	17
Moore v. Cleveland Ry. Co.	17
1. Administrative Practice	18
2. The History of Section 272 (d)	19
3. Manifest Purpose of Section 272 (d)	20
4. The Phrasing of the Statute	21
Roos v. U. S.	24
Diamond Alkali v. Driscoll	27
Associated Mutuals, Inc. v. Delaney	28
Randall v. Riddell	32
Summary of Cases	32
IV. THE CONTENTIONS OF THE UNITED STATES	32
The *Monge v. Smyth* Contention	32
The "Unilateral Action" Argument	33
The Remaining Contentions	35
CONCLUSION	38

CITATIONS

Cases

Associated Mutuals, Inc. v. Delaney, 176 F. 2d 179 ..... 12, 28, 32, 36

Botany Mills v. United States, 278 U. S. 282 21

Diamond Alkali Co. v. Driscoll, decided June 13, 1940 (W. D. Pa.) 27, 28

East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 17

McCarthy Co. v. Commissioner, 80 F. 2d 618 ..... 9, 10, 11, 12, 13, 16, 17, 18, 19, 21, 24, 32, 33, 35, 37

Monge v. Smyth, 229 F. 2d 361 ..... 32, 33

Moore v. Cleveland Ry. Co., 108 F. 2d 656 ..... 12, 17, 18, 19, 20, 21, 24, 27, 28, 31, 32

Mutual Lumber Co. v. Poe, 66 F. 2d 904 ..... 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 21, 24, 32, 33, 35, 37

Payson v. Commissioner, 166 F. 2d 1008 21

Randall v. Riddell, decided February 7, 1952 (S. D. Cal.) 32

Roos v. United States, 31 F. Supp. 141 ..... 24, 27, 28, 30, 32

Standard Portland Cement Co. v. U. S., 80 F. 2d 585 24

Statutes

Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. V.):

Sec. 6213 (d) 11, 24, 35

Internal Revenue Code of 1939 (26 U. S. C. 1952 ed.):

Sec. 271 (a) 22, 23

Sec. 272 (a) 1, 2, 3, 4, 5, 12, 13, 22, 23, 29, 30, 36

Sec. 272 (b) 35

Sec. 272 (d) 1, 2, 3, 4, 5, 10, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 35, 36

Statutes

Sec. 272 (f) 34, 35

Revenue Act of 1924, C. 234, 43 Stat. 253:

Sec. 274 ..... 2, 5, 7

Sec. 274 (a) 2

Sec. 274 (b) 7

Sec. 274 (c) 7

Sec. 900 ..... 2, 5, 29

Revenue Act of 1926, C. 27, 44 Stat. 9:

Sec. 274 (a) 15

Sec. 274 (d) 7, 8, 9, 10, 13, 15, 16, 19, 21, 24, 31

Revenue Act of 1928, Sec. 272 (d) 17

Revenue Act of 1936, Sec. 272 (d) 10, 19

Miscellaneous

Geary, 20 Taxes 390 (1940) 10

H. R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241) 6, 29

H. Rep. No. 1337, 83d. Cong., 2d. Sess. p. A405 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4552) 35

Letter of Commissioner of Internal Revenue (1941-2 Cum Bull. 368) 10

9 Mertens, Law of Federal Income Taxation, § 49.99 (1943) 10

Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., p. 53 on Proposed Revision of the Revenue Laws, January 14, 1938 9

Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332) 3, 7, 10, 19, 21, 24, 25, 30, 31

Sen. Rep. No. 1622, 83d Cong. 2d Sess. (3 U. S. C. Cong. & Adm. News (1954) 4621, 5222) 35

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The District Court did not write an opinion. Instead it made findings of fact and conclusions of law. (R. 25.) The opinion of the Court of Appeals (R. 65-71) is reported at 263 F. 2d 382.

QUESTION PRESENTED

The question presented is whether, under the language of subsections (a) and (d) of Section 272 of the 1939 Internal Revenue Code, the execution by a taxpayer of a U. S. Treasury Form

870 (as distinguished from a U. S. Treasury Form 870-TS), prior to the issuance of a notice of deficiency by the Commissioner of Internal Revenue, relieves the Commissioner of the restrictions imposed upon him by subsection (a) of Section 272. Stated in another fashion, the question is whether a taxpayer under the provisions of subsections (a) and (d) of Section 272 may validly waive his rights to appeal to the Tax Court of the United States before he has received from the Commissioner the written notice of deficiency which is a pre-requisite to an appeal.

SUMMARY OF ARGUMENT

Section 272, Internal Revenue Code of 1939, is derived from Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. When Section 274 of the 1924 Revenue Act was enacted, its purpose was to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals. That is, Section 274 of the 1924 Revenue Act created the sole procedural steps by which the jurisdiction of the Board of Tax Appeals was invoked. Thus, Section 274(a) of the Revenue Act of 1924, and hence Section 272(a) of the 1939 Internal Revenue Code, each provided in the first sentence that *if* the Commissioner *determined* a deficiency in tax, a notice of *such deficiency* was to be sent to the taxpayer. The second sentence then stated that the taxpayer could, within ninety days after such notice of deficiency was mailed, appeal to the Board of Tax Appeals for a *redetermination* of the deficiency.

But what if the Commissioner did not send such a notice of deficiency? The third sentence of Section 272(a), Internal Revenue Code of 1939, created restrictions against assessment or a proceeding in court for the collection until such notice of deficiency was mailed to the taxpayer and ninety days had elapsed without the filing of a petition in the Tax Court. However, these prohibitions created a problem for the taxpayer who did not wish to file a petition in the Tax Court within the ninety days, but who desired that the interest stop running on the deficiency.

Therefore, in order to give the taxpayer the right to stop the

running of interest for the period of time from the date the notice of deficiency was sent until the ninety days had elapsed, subsection (d) of Section 272 provided that the taxpayer at any time had the right to waive the restrictions of subsection (a) on the assessment and collection of the whole or any part of "the deficiency." This meant that "the deficiency" had to be determined and a notice thereof issued to the taxpayer before any restrictions could be waived. The reason was that the phrase "the deficiency" qualified the preceding words "at any time" found in subsection (a) because a reference back to subsection (a) reflects that "the deficiency" means a deficiency that has been determined and notice thereof issued. Thus, no waiver can be valid under subsection (d) until the deficiency has been determined and notice of such deficiency sent to the taxpayer.

Furthermore, such an interpretation squares with the intent of the Congress when the waiver subsection first became law. The Senate Finance Committee report of 1926 stated that such waivers gave the taxpayer the right to waive in writing the restrictions "on the Commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 Cum. Bull. (Part 2) 332, 352). Since a notice of deficiency is a prerequisite to an appeal to the Board of Tax Appeals, it must follow that such a waiver cannot be valid unless a notice of deficiency was sent before the execution of such waiver.

In short, a taxpayer cannot waive his right to appeal to the Tax Court until he has obtained that right via a notice of deficiency. At that time he may waive the restrictions on the Commissioner against assessing and collecting the deficiency.

ARGUMENT

The taxable year involved is 1946. The U. S. Treasury Form 870 executed by respondent was filed in 1949. Therefore, the Internal Revenue Code of 1939 is controlling. Specifically, it is subsections (a) and (d) of Section 272 which must be interpreted. Since these two subsections are related to each other structurally and because § 272(d) contains an express reference to § 272(a),

it follows that these two subsections should be read and interpreted in conjunction with each other rather than each by itself. Turning to the statutory language, the following is found:

"Sec. 272 Procedure in General.

(a) (1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] Petition to the Tax Court of the United States.—*If* in the case of any taxpayer, *the Commissioner determines that there is a deficiency* in respect of the tax imposed by this chapter, the Commissioner is authorized to send *notice of such deficiency* to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or *proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer*, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(d) Waiver of Restrictions — The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiency*." (Italics supplied).

Whether the above language supports the view that a taxpayer may waive his right to appeal to the Tax Court before he has obtained that right via the notice of deficiency is the issue here. This is so because the Court of Appeals, sitting en banc, held that the statutory notice is a prerequisite to the filing of a valid waiver under Section 272(d). Also, the United States has agreed, at page 2 of its brief, that this is the issue by saying:

"Stated otherwise, may a taxpayer waive in advance the issuance of a 90-day letter?"

In order to answer this question, it is necessary to examine the

legislative history of Section 272(a) and (d), read the statutory language carefully, and analyze the reasoning of the case law in point before replying to petitioner's contentions.

I

The Legislative History of Section 272(a) and (d), Internal Revenue Code of 1939

Section 272(a) of the Internal Revenue Code of 1939 is the direct descendant of Section 274 of the Revenue Act of 1924,[1] 43 Stat. 253, C. 234, which was added to the law in 1924 to sup-

1. "Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

plement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals. This is evidenced by the Ways and Means Committee report which stated:[2]

"Section 274(a): This subdivision provides for *notice and an opportunity* for an appeal to the Board of Tax Appeals (a

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(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period."

[2] H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258.)

body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." (Italics supplied)

That is, Section 274 of the Revenue Act of 1924 established the sole procedural steps by which a taxpayer could invoke the jurisdiction of the Tax Court. A reading of Section 274 of the Revenue Act of 1924[3] and the above quoted Ways and Means Committee language shows that the notice *and* an opportunity for appeal was to be given taxpayers "in cases where the Commissioner determined that there is a deficiency."

But what about the problem of interest charges running after the notice of deficiency was issued? Subsection (c) of Section 274 of the Revenue Act of 1924[4] provided that if the taxpayer did not file an appeal within the 60-day period, the deficiency could then be assessed. This meant that the Commissioner could not assess the "deficiency of which the taxpayer has been notified"[5] until after a notice had been issued and the 60-day period had elapsed. Consequently, since interest was charged from the date prescribed for payment of the tax until the date of assessment of the deficiency, a taxpayer was required to pay an additional 60 days of interest even if he decided not to file an appeal with the Board of Tax Appeals after receiving the notice of deficiency required by subsection (b) of Section 274 of the Revenue Act of 1924. Thus, the stage was set for a waiver provision.

In 1926, Congress adopted the first waiver provision in the form of Section 274(d) of the Revenue Act of 1926[6], and said in explanation thereof, speaking through the Senate Finance Committee:[7]

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[3] See footnote 1 for text.

[4] See footnote 1 for text.

[5] Section 274 (c), Revenue Act of 1924.

[6] "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.

[7] Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 (Part 2) Cum. Bull. 332, 352).

"The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in Section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board.* It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Italics supplied)

In other words, the waiver provision was never intended to do more than allow the taxpayer the right to avoid the running of interest after he had received a notice of deficiency. This is so because a taxpayer could only appeal to the Board of Tax Appeals after he had received a notice of deficiency from the Commissioner. Therefore, when the Finance Committee stated that subsection (d) does not take away the right of the taxpayer to take the case to the Board, it must be concluded that the waivers contemplated were those which came into existence only after a notice of deficiency was issued.

Stated otherwise, Section 274(d), Revenue Act of 1926, granted a right to the taxpayer without taking away his right to take the case to the Board of Tax Appeals. He was given the right to stop the running of interest after receiving a notice of deficiency, and was not required to waive his right to appeal to the Board of Tax Appeals in exchange therefor. The subsection was never designed to relieve the Commissioner of the requirement that he *determine* a deficiency and issue a notice thereof.

In view of the above quoted explanation by the Senate Finance Committee of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co. v. Poe*, 66 F. 2d 904 (C. A. 9th, 1933), certiorari denied, 290 U.S. 706, that waivers filed before the issuance of a notice of deficiency were premature and therefore invalid, and said, at pages 906 and 907:

"Section 274(a), supra, (26 USCA 1048), contains the initial and important condition, 'if in the case of any taxpayer, the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section.

" . . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Italics supplied)

Nor was it unexpected that the *Mutual Lumber Co. v. Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co. v. Commissioner*, 80 F. 2d 618 (C. A. 9th, 1935), certiorari denied, 298 U.S. 655, wherein Judge Garrecht said, at page 621:

"It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, is premature and therefore invalid. In Mutual Lumber Co. v. Poe, 66 F. 2d 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . . "

Following the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* and because these were the only cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was raised in 1938 by a Subcommittee of the Committee on Ways and Means. The report[8] issued by this Subcommittee stated:

"As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination of the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amendment to

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[8] Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess., p. 53, on Proposed Revisions of the Revenue Laws, 1938.

what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

> "... to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right, at any time after a deficiency is *proposed* in any manner that the Commissioner may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed." (Italics supplied)

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d) (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[9] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to the Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[10] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[11] This proposed statutory language was designed to overcome the *Mutual Lumber Co. v. Poe* and *McCarthy Co. v. Commissioner* cases, *supra*, which held that waivers to be valid under Section 272(d) of the 1939 Internal Revenue Code must be preceded by the issuance of a statutory notice of deficiency.[12]

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[9] Sen. Rep. No. 52, 69th Con., 1st Sess., p. 27 (1939-1 (Part 2) Cum. Bull. 332, 352).

[10] Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

[11] Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

[12] *Ibid.*

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions — The taxpayer shall at any time (*whether or not a notice of deficiency has been issued*) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency." (Italics supplied)

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said that such language did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means Committee that the Ninth Circuit had held such waivers invalid, and it had seen the change proposed in Section 2604 of the Internal Revenue Administrative Code offered by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Taxpayer submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code, is strong support for the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Ninth Circuit said it meant in the *Mutual Lum-*

ber Co. and *McCarthy Co.* cases, *supra.* Also, when this later legislative history is considered in the light of the language of the Senate Finance Committee report which first introduced the same statutory language found in Section 272(d) of the 1939 Internal Revenue Code, it is difficult to see how one could support a contention that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* should be overturned unless those cases holding contra (*Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C. A. 6th, 1940) and *Associated Mutuals, Inc. v. Delaney*, 176 F. 2d 179 (C.A. 1st, 1949)) are based on statutory language which clearly and unambiguously requires such a decision.

II

The Language of Subsections (a) and (d) of Section 272, Internal Revenue Code of 1939

When the phrasing of both subsections (a) and (d) is examined, certain factors are noted.

First, subsection (d) permits the taxpayer to waive "at any time" certain restrictions set forth in subsection (a). But what are these restrictions? Subsection (d) says they are the "restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiency.*" Therefore, the question arises as to the meaning of the words "the deficiency." Surely these words mean the same as do the same words found in the second sentence of subsection (a). Since a reading of the second sentence shows that "the deficiency" used therein refers to the first sentence of subsection (a), it follows that the answer must be found in the first sentence. Turning to the first sentence it is seen that the phrase "If . . . the Commissioner *determines* that there is a deficiency . . . " is followed by the phrase " . . . the Commissioner is authorized to send *notice of such deficiency.*" This language reflects that "the deficiency" refers to a deficiency which has been determined. That is, the taxpayer may waive the restrictions on the assessment and collection of a deficiency which has been determined. This means that a notice of deficiency must have been issued before there could be a waiver.

Furthermore, such an interpretation conforms and fits the purpose of subsection (a) which was to establish the procedural route by which a taxpayer invoked the jurisdiction of the Tax Court. It would seem rather odd to find that the words "the deficiency" do not refer to a deficiency which has been determined when subsection (d) expressly refers to the "restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiancy.*" This is particularly so when it is remembered that subsection (a) does not concern itself with the problems of assessment and collection but rather with creating the method (notice of deficiency) by which a taxpayer could appeal to the Tax Court.

Consequently, when Judge Sawtelle stated in *Mutual Lumber Co. v. Poe, supra,* that the phrase "If . . . the Commissioner determines that there is a deficiency . . . "qualifies subsection (d), he was reading the statute in a manner which was consonant with the rules of grammatical construction. Also, his interpretation acknowledges that subsections (a) and (d) are related to each other as part of the same section and cannot be read separately. Thus, unless the cases contra to *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are based on better reasoning or a more careful analysis or more scholarly research, the Ninth Circuit should be upheld.

III

The Applicable Case Law

Although there are several methods of arranging the pertinent cases for purposes of analyzing them, taxpayer submits that a chronological review will be workable here.

Mutual Lumber Co. v. Poe

The first case involving the validity of a waiver under subsection (d) of Section 274 of the Revenue Act of 1926 arose in the Ninth Circuit in 1933 and was styled *Mutual Lumber Co. v. Poe, supra.* Since subsection (d) was the original waiver provision, it is interesting to note at page 905 of the decision that the U. S. Treasury Form 870 submitted to the Mutual Lumber Co. was entitled:

"Waiver of Right to File a Petition with the United States Board of Tax Appeals"

Immediately thereafter the waiver form provided:

"The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and consents to the assessment and collection of a deficiency in tax for the year or years of 1920 and 1921 aggregating $28, 175.61, . . ."

In other words, the U. S Treasury itself recognized that the effect of its printed waiver form, if valid, was to destroy the taxpayer's right to appeal to the Board of Tax Appeals.

On December 1, 1926, the Commissioner wrote a letter to the Mutual Lumber Co. asking that it file consents extending from December 31, 1926, until December 31, 1927, the statute of limitations for the assessment of 1920 and 1921 taxes. On December 10, 1926, the taxpayer replied declining to execute such consents and advised the Commissioner that it had signed the Form 870, dated December 2, 1926, and had mailed it to the Commissioner who received it on December 11, 1926. Thereafter, on December 16, 1926, the Commissioner issued a 60-day notice of deficiency setting forth the asserted deficiencies for 1920 and 1921. The assessment of these deficiencies was made on March 5, 1927. Subsequently, on April 27, 1927, the Mutual Lumber Co. paid the deficiencies under protest. Later a refund action was instituted in the U. S. District Court against Mr. Poe, the Collector of Internal Revenue, for their recovery.

When the matter reached the U. S. Court of Appeals for the Ninth Circuit the second time, the issue was whether the running of the statute of limitations (December 31, 1926) was suspended by the mailing of the notice of deficiency on December 16, 1926, after the U S. Treasury Form 870 had been filed with the Commissioner. The Ninth Circuit, in deciding the matter stated at page 906:

"The question that we regard as determinitive of the instant case is whether or not the purported waiver of right to file an appeal, signed by the appellant was *valid*. If it was invalid,

necessarily the filing of the document could not affect the Commissioner's right to mail a deficiency letter and to derive the benefit of the consequent suspension of the statute of limitations." (Italics supplied)

That is, the Ninth Circuit, acknowledging that the issue was whether the statute of limitations for the assessment had run on March 5, 1927, nevertheless categorically stated that the answer depended upon whether the waiver form 870 was valid or not.

In deciding the case for the Collector of Internal Revenue, the Ninth Circuit held that the subject waiver was premature and therefore invalid. This meant, said the opinion, that the waiver was powerless to prevent the Commissioner's resort to a letter of deficiency by which the running of the statute was suspended. The reasoning is best expressed by the opinion itself at page 906:

"Section 274(a), supra, contains the initial and important condition —

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, etc.

This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section.

One of those provisions is subsection (d), upon which the appellant chiefly relies. Reading that subsection in the light of the foregoing condition specifically set forth in subsection (a), we are impelled to the conclusion that the taxpayer's 'right' 'to waive the restrictions provided in subdivision (a) of this section' is qualified by the condition specified in the very subsection (a) just referred to; namely, 'if in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect to the tax,' etc. If there is *no* determination of a deficiency by the Commissioner, there is no right of appeal for the taxpayer to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal. This is clear from the terms of the subsection itself, which computes the time allowed for the filing of a petition with the Board of Tax Appeals, not from the mailing of an *agent's* report but from the mailing of the *Commissioner's* notice of deficiency."

In short, the Ninth Circuit sustained the United States in the col-

On the other hand, it must be recognized that the actual administrative practice did not support Judge Simons. In both the *Mutual Lumber Co.* and the *McCarthy Co.* cases, *supra*, and in *Moore v. Cleveland Ry. Co., supra*, itself, the Commissioner did not rely on the executed waiver form to assess and collect the tax. Rather a notice of deficiency was issued to the taxpayer in each case. Thus, to say or infer that the administrative practice of the Commissioner supports the validity of such waivers is to offer a statement or inference which is without support.

2. The History of Section 272(d)

Insofar as Judge Simons' reliance on the history of Section 272(d) is concerned, it is necessary to point out that he did not cite or mention the 1926 Senate Finance Committee's report, *supra*, p. 10, which made the flat statement that the waiver subsection (Section 274(d), Revenue Act of 1926) permitted a waiver, "but without taking away the right of the taxpayer to take the case to the Board." Consequently, the opinion did not deal with the problem of how a taxpayer could still have the right to appeal to the Board of Tax Appeals unless a notice of deficiency was issued prior to the filing of a waiver.

Furthermore, the strength of Judge Simons' historical supports should be evaluated in the light of his statements about the failure of Congress to amend subsection (d) of Section 272 in 1938 even though a committee report recommended an amendment because of *Mutual Lumber Co. v. Poe, supra*, and *McCarthy Co. v. Commissioner, supra*, which invalidated such waivers. His opinion stated, at page 660:

> "It is true that no such amendment has yet been adopted by the Congress. The report from which we quote, however, was made on January 14, 1938, and the grave concerns, domestic and international, which since that date have engrossed the Congress, and of which we take judicial notice, permit no adverse inference to be drawn from such failure, as appears to have been drawn in East Bay Water Co. v. McLaughlin, supra."

The taxpayer submits that the problems, both domestic and inter-

lection of $28,175.61 in deficiencies by holding that a waiver to be valid under subsection (d) of Section 274, Revenue Act of 1926, must be preceded by a determination of a deficiency in the form of a notice of deficiency.

McCarthy Co. v. Commissioner

In 1935 there arose the second case concerning the validity of a U. S. Treasury Form 870. The case, *McCarthy Co. v. Commissioner, supra,* raised, as did *Mutual Lumber Co v. Poe, supra,* the question of whether the statute of limitations, which would normally have run on December 31, 1929, was extended by the issuance of a notice of deficiency on December 27, 1929. The taxpayer argued that since it had filed on October 27, 1929, a waiver of right to file a petition in the Board of Tax Appeals and consented to assessment and collection, the statute of limitations prevented assessment after December 31, 1929. That is, the taxpayer again argued that the notice of deficiency of December 27, 1929, was a "useless act" because of the previously filed U. S. Treasury waiver form, and could not suspend the running of the statute of limitations on assessment and collection.

Judge Garrecht, in disposing of this contention, reaffirmed the holding of *Mutual Lumber Co. v. Poe, supra,* respecting the validity of a waiver filed under subsection (d) of section 274, Revenue Act of 1926, holding at page 621 that:

> "It has already been decided by this court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, is *premature* and therefore *invalid.* In *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904, certiorari denied 290 U. S. 706, the late Judge Sawtelle said. . ." (Italics supplied)

Thus, for the second time in two years the United States collected additional taxes which would have been barred had the waiver (U S. Treasury Form 870) been valid when executed before issuance of a notice of deficiency. In this instance it was an additional $12,784.78.

Furthermore, it is worth noting that in neither case did the United States rely on the validity of the waiver of the right to file a petition to the Board of Tax Appeals and consent to immediate assessment. Instead, notices of deficiency were issued, after the execution of the U. S. Treasury Form 870, to the Mutual Lumber Co. and the McCarthy Co. Also, it is important to remember that both waivers openly stated that they purported to waive the taxpayers right to appeal to the Board of Tax Appeals.

East Bay Water Co. v. McLaughlin

Three years after the decision in *McCarthy Co. v. Commissioner, supra,* the Government, in *East Bay Water Co. v. McLaughlin,* 24 F. Supp. 222, 228 (D.C.N.D. Cal., 1938), contended that "*any* waiver filed prior to the determination of an assessment by the Commissioner is premature and invalid." The reason the Government advanced this view was that it charged interest on $571,271.60 of asserted additional tax due for the period October 4, 1930, to June 24, 1931, even though the taxpayer had filed a waiver, purportedly within the meaning of subsection (d) of Section 272, Revenue Act of 1928, on September 4, 1930.

The District Court, citing both the *Mutual Lumber Co.* and the *McCarthy Co.* cases, *supra,* held that such waivers were premature and invalid if filed before a notice of deficiency had been issued. This meant that the Government, for the third time in five years, had collected either additional tax or interest over the dead body of its own Form 870. Also, the District Court felt compelled to note that although the problem created by the *Mutual Lumber Co.* and the *McCarthy Co.* decisions, *supra,* had been brought to the attention of a subcommittee of the Ways and Means Committee of the U. S. House of Representatives on January 14, 1938, no action had been taken by Congress.

This then was the situation or stage when the first decision contrary to the above cases made its appearance.

Moore v. Cleveland Ry. Co.

Seven years after the Ninth Circuit decided *Mutual Lumber Co. v. Poe, supra,* and five years after *McCarthy Co. v. Commis-*

sioner, supra, the first conflicting decision was handed down by the Sixth Circuit in *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C. A. 6th, 1940). All of the other contra decisions came later, and a reading of them will reveal that each rests upon, and cites as authority, *Moore v. Cleveland Ry. Co., supra.* Therefore, since the latter case is the fountain head of the view that waivers filed prior to issuance of a notice of deficiency are valid, it follows that to the extent that the Sixth Circuit's opinion in the *Moore* case, *supra,* is poorly reasoned or based upon inadequate research, all of the other decisions are severely weakened.

An analysis of the opinion in the *Moore* case, *supra,* reveals that Judge Simons at page 659 disregarded the Ninth Circuit's interpretation in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* because, in his judgment, the Ninth Circuit's view took no account of "the phrasing of the Statute, the manifest purpose of § 272(d), its history, or administrative practice." Turning to each of these factors in reverse order, the following is noted:

1. Administrative Practice

The administrative practice referred to is not elaborated on further in Judge Simons' opinion. However, let it be assumed that it was the consistent practice of the Commissioner, prior to 1940, not to issue a statutory notice of deficiency, as required by Section 272 of the 1939 Internal Revenue Code and its predecessors, once a taxpayer signed a waiver form under the purported authority of Section 272(d), Internal Revenue Code of 1939. If this were the case, the Commissioner was engaging in such practice during a seven year period when the only court decisions interpreting Section 272(d) and its predecessors had held such waivers to be invalid. *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra.* How can administrative practice which violates the only reported court decisions as to the meaning of Section 272(d) support a contrary interpretation of Section 272(d) particularly in view of the failure of Congress to change Section 272(d) until 1954 or nearly sixteen years after it was told that existing case law required such a change?

national, which confronted the Congress in 1954 were equally grave, and yet action was taken not only to amend subsection (d) of Section 272 but to completely revise the entire Internal Revenue Code. Thus, it is extremely doubtful that inferences drawn from a failure to amend the law in 1938 can be avoided simply by taking judicial notice that the 1938 Congress had other problems. If so, no inference is ever justified respecting the failure of Congress to amend legislation since it always has other domestic and international problems. What the historical reasoning of the *Moore v. Cleveland Ry. Co., supra,* opinion says in effect is that while Congress did not change what it recognized was the law as interpreted by the only reported decisions, namely that waivers were invalid if signed before a deficiency notice was issued, nevertheless the legislative history shows that such waivers are valid.

Nor can taxpayer's inference be avoided, as the United States attempts at page 16 of its brief simply by observing that the 1938 proposed amendment was not adopted "(for reasons which are not apparent, the legislative history being barren on the matter)." After all, if the reasons were apparent, there would be no need to draw inferences. An inference cannot be escaped merely by pointing out that it is an infrence.

Therefore, it seems that the views of Judge Simons respecting the legislative history of subsection (d) of Section 272 are not such that they should be preferred over the review found in Part I hereof. Indeed the discussion of legislative history found in *Moore v. Cleveland Ry. Co., supra,* is merely a series of conclusions rather than a presentation of the relevant material from which one could evaluate the conclusions.

3. Manifest Purpose of Section 272(d)

Next the Sixth Circuit referred (as has the United States at page 10 of its brief) to the "manifest purpose" of subsection (d) of Section 272, saying, at page 659, that:

> "The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner. . ."

The taxpayer urges that a statutory purpose is not ascertained merely by labeling a preferred statement of purpose as "manifest" and following it with unsupported statements respecting the purpose of the statute. To begin with, the above-quoted language from *Moore v. Cleveland Ry. Co., supra,* is flatly contradicted by the previously quoted language of the 1926 Senate Finance Committee report, *supra,* p. 10, which stated that the purpose was to permit a taxpayer to pay the tax and stop the running of interest, "but without taking away the right of the taxpayer to take the case to the Board." Certainly it was not the intent of Congress in adopting Section 272(d) that the taxpayer's tax liability be settled if he was still to have the right to take the case to the Board. Rather it was simply to allow him to pay the alleged tax after issuance of a notice of deficiency and stop the running of interest. Furthermore, it has always been the law that the execution of a U. S. Treasury Form 870 does not settle a taxpayer's liability, and further deficiencies for the same year may be claimed by the Commissioner after execution of such waivers.[13] Thus the purpose of subsection (d) of Section 272 could not have been "to permit the taxpayer to settle his tax liability." Also, it is incorrect to say its purpose was to allow the Government to get its money. A taxpayer could always pay the asserted tax, prior to passage of Section 274(d), Revenue Act of 1926, but the taxpayer could not stop the running of interest because the tax could not be assessed.

Consequently, it is suggested that the "manifest" purpose of Section 272(d), as determined by *Moore v. Cleveland Ry. Co., supra,* is not what that opinion says it is.

4. The Phrasing of the Statute

Finally, *Moore v. Cleveland Ry. Co., supra,* relied on the phrasing of the statute as support for its refusal to follow *Mutual Lumber v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* saying at page 659:

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[13] *Botany Mills v. United States,* 278 U.S. 282; *Payson v. Commissioner,* 166 F. 2d 1008 (C.A. 2d, 1948).

". . . A deficiency is defined by § 271(a) as 'the amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return . . .' It would seem, therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commissioner or his agents. *True, it is, that before there has been ascertainment, a waiver is too indefinite to avail the taxpayer as a bar to interest, or the Commissioner in collection.* Once the deficiency has been *ascertained*, however, *even though but tentatively*, and there is waiver with respect to the amount so ascertained, no reason appears why to that extent the waiver is not valid so as to permit assessment and collection to go forward with dispatch. The restrictions waived are in the taxpayer's interest and, if satisfied with the preliminary determination, he may make an earlier settlement of his liability so as to avoid further interest. This seems to be the clear meaning of § 272(d) which recites that 'the taxpayer shall at any time have the right, etc.' If by that section the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so. While it is true that there may be no appeal from a determination until it is final, this is not the only restriction provided by §272(a). The waiver releases the Commissioner from obligation to wait 60 days after the mailing of the deficiency notice before making assessment or collection of the tax." (Italics supplied)

The above reasoning should be closely examined before this Court adopts it.

First, Section 272(a), which is the applicable section when interpreting Section 272(d), does not refer to "deficiency" as defined in Section 271(a), Internal Revenue Code of 1939. Instead it says:

"If the Commissioner determines that there is a deficiency . . ., the Commissioner is authorized to send notice of *such* deficiency to the taxpayer . . ."

Thereafter, Section 272(a) imposes restrictions against the Commissioner until he has issued such a "notice" of deficiency. Then Section 272(d) provides that "The taxpayer shall at any time have the right to waive those restrictions on the assessment and col-

lection of *the deficiency.*" Certainly the phrase "the deficiency" found in Section 272(d) can only refer to the deficiency "determined" by the Commissioner referred to in Section 272(a). If Section 272(d) permits waiver of the restrictions set forth against assessing and collecting the deficiency which restrictions are set forth in the third sentence of Section 272(a), surely the meaning of "deficiency" is not determined by referring to an entirely different section such as Judge Simons has done in turning to Section 271 (a). The words "the deficiency" found in Section 272(d), which were not quoted by Judge Simons, assuredly qualify the words "shall at any time" found in the initial portion of the sentence. Section 272(d) simply means, as the Ninth Circuit held, that a taxpayer may waive the restrictions imposed upon the Commissioner by Section 272(a) upon the collection or assessment of "the deficiency." However, that deficiency must be ascertained or determined before it can be waived.

Judge Simons says there can be a deficiency before one has been determined, but interest on such a "deficiency" cannot be waived. However, he goes on to say that once it has been ascertained, even tentatively, interest on a tentative deficiency can be waived. This, it is submitted, is threading the needle in rather fine fashion. How can there be "ascertainment" on a "tentative" basis?

Not only is "ascertainment" on a "tentaive" basis a contradiction in terms, but subsection (a) of Section 272 provides that the Commissioner must "determine a deficiency" and send a "notice of *such* deficiency" or certain restrictions will be imposed. The section does not mention ascertainment on a tentative basis. The preliminary report of a Revenue Agent is not a deficiency or a determination of a deficiency and a taxpayer cannot appeal to the Tax Court from such a provisional report. And if there can be no appeal without a notice of deficiency, how can waivers permitted by subsection (d) of Section 272 not take away the right to appeal to the Tax Court if there is no determination of a deficiency and no notice of a deficiency issued to the taxpayer before the waiver is considered valid? When subsection (d) of Section 272 permits a waiver of the restrictions against collection and assess-

ment of "the deficiency", it means what the Ninth Circuit Court said it means. There must be determination of a deficiency before a waiver is valid under subsection (d) of Section 272.

Finally, the Sixth Circuit said, at page 659:

> ". . . If by that section (272(d)) the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so . . ."

This is exactly what Congress did say when the 1926 Senate Finance Committee's report, *supra*, p. 10, stated that the filing of such waivers did not take away the right of the taxpayer to appeal to the Board. Also, Congress made it clear in 1954 when Section 6213(d) added the phrase "whether or not a notice of deficiency has been issued."

From the foregoing, it is questionable whether *Moore v. Cleveland Ry. Co., supra,* contains either the analysis or legal authority to cause one to reject *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* regardless of how much inclination one might have to do so.

Roos v. U.S.

Within one month after the 1940 decision of *Moore v. Cleveland Ry. Co., supra,* the U. S. Court of Claims decided *Roos v.* U. S., 31 F. Supp. 144 (Ct. Cls., 1940). Here again, as in *Moore v. Cleveland Ry. Co.*, the Commissioner claimed interest, computed for a period beyond the thirty days after a U. S. Treasury Form 870 had been executed. Here the theory he advanced was that a waiver under subsection (d) of Section 274, Revenue Act of 1926, could not stop the running of interest unless it was filed after he (Commissioner of Internal Revenue) had made a final determination of the tax liability and mailed a notice of deficiency. The authority cited was *Standard Portland Cement Co. v. U.S.*, 80 F. 2d 585 (C. A. 3rd, 1935).

In deciding the issue against the United States, the Court of Claims wrote an opinion which sustains the taxpayer's position in the instant case.

After Louise Roos executed and filed a U. S. Treasury Form 870 entitled "Waiver of Right to File a Petition with the United States Board of Tax Appeals", the Commisisoner issued a notice of deficiency for an amount larger than that set forth in the Form 870. When the tax was assessed, the Commissioner charged the taxpayer interest for the period commencing thirty days after the filing of the U. S. Treasury Form 870 until the additional tax was assessed sometime after the notice of deficiency was issued. Turning to the Court of Claims for relief from this charge for interest, the taxpayer and United States were told by Judge Littleton that there was a difference between waiving one's right to petition the Board of Tax Appeals and agreeing to immediate assessment. The Court, after setting forth the 1926 Senate Finance Committee's report, *supra*, p. 10, stating that subsection (d) did not take away the right to appeal to the Board, said at page 149 that:

> "From what has been shown above we think it is clear that the execution of and the filing with the Commissioner by plaintiff of the signed notice in writing stopped the running of interest on the amount of $18,447.91 of the deficiency for 1927 thirty days after the filing of such notice, and that the notice was valid and effective *for that purpose,* notwithstanding the fact that it was filed prior to the date on which the Commissioner made his final determination with respect to plaintiff's tax liability for 1927 and mailed notice to plaintiff by registered mail disclosing the result of his determination." (Italics supplied)

In other words, Judge Littleton limited the validity of the waiver to the stopping of interest for the period commencing thirty days after the filing of the Form 870.

In explaining this restriction or limitation to the holding, the Court of Claims pointed out that while subsection (d) gave the right to waive "at any time" the restrictions on assessment and collection, it did not relieve the Commissioner from the duty to determine the deficiency and issue a notice of deficiency. This is reflected by the following language from the opinion at page 150:

". . . The fact that plaintff included in the notice a provision that she also waived the right to appeal to the Board of Tax Appeals from a determination by the Commissioner of a deficiency for that year, to the extent of $18,447.91, did not affect the validity or legality of the waiver. *Nor do we think the notice had the effect of changing or modifying any provision of the statute except* those provisions of section 274 to the effect that the Commissioner should withhold assessment and collection until 60 days after the deficiency notice had been mailed or, if an appeal was filed, until the decision of the Board became final . . ." (Italics supplied)

From this language, it is clear that the Court of Claims concluded that a determination and notice of deficiency must be issued whether the Form 870 was filed or not. Indeed the opinion goes on to state flatly at page 150 that:

". . . Provision for the filing of a written notice waiving the restrictions mentioned was never intended, as is shown by a consideration of other provisions of the statute, to affect *in any way the* right or *duty* of the Commissioner to proceed, as provided by the statute, *to determine* the correct tax liability for the taxable year involved *and to mail a notice to the taxpayer* setting forth the result of such determination. And, as shown by the report of the Senate Finance Committee quoted above, *it was never intended that a taxpayer* by waiving the restrictions on assessment and collection *should lose the right of appeal* to the Board of Tax Appeals. On the contrary, the committee specificially pointed out that the purpose of subdivision (d) was to permit the taxpayer to pay a deficiency in whole or in part *without losing the right of taking the case to the Board* of Tax Appeals *whenever the Commissioner should render his final determination . . .*" (Italics supplied)

That is, Judge Littleton, because a notice of deficiency had been issued after the execution of Form 870 in the case before him, did not deal with the validity of a Form 870 where the facts are that the Commissioner has never issued a notice of deficiency.

In short, would Judge Littleton or the Court of Claims, upon the basis of the above language, permit the Commissioner to

maintain, as was attempted in the District Court in this case, an action seeking final judgment for the amount set forth in the Form 870, where, as here, the taxpayer has never received a notice of deficiency or an opportunity to appeal to the Tax Court? Does not the language of the *Roos* opinion, *supra,* clearly show that a Form 870 cannot be used in such a manner by the Commissioner that the taxpayer loses his right to petition the Tax Court? Is it likely that the Court of Claims would hold that the execution of a Form 870 in 1949 authorizes an action seeking final judgment in 1956 when no notice of deficiency has ever been issued?

When the *Roos* opinion, *supra,* is analyzed, it cannot be said to support the proposition that Form 870's are valid, even for the purpose of allowing immediate assessment, where the record shows that no notice of deficiency has ever been issued. The most that can be said for the holding is that the execution of a Form 870 stops the running of interest thirty days after the filing thereof.

Diamond Alkali v. Driscoll

The third of the Government's cited case supports was *Diamond Alkali v. Driscoll,* W. D. Pa., decided June 13, 1940 (40-2 USTC ¶9526). The facts were that a Form 870, entitled "Waiver Of Right To File A Petition With The United States Board Of Tax Appeals" was filed in September of 1928. Thereafter, the Commissioner on June 10, 1930, *mailed a notice of deficiency* to Diamond Alkali. Subsequently, the determined deficiency was assessed, and, as in *Roos v. U.S., supra,* the Commissioner claimed interest on the additional tax set forth in the Form 870 for a period commencing 30 days after the filing of the waiver form.

Relying on *Roos v. U.S. supra,* and *Moore v. Cleveland Ry. Co., supra,* and pointing out that the Government had not appealed those decisions, and without an opinion, the District Court held

that a Form 870 was effective to *stop the running of interest* at a date not later than thirty days thereafter.

Associated Mutuals, Inc. v. Delaney

In *Associated Mutuals, Inc. v. Delaney*, 176 F. 2d 179, (C.A. 1st, 1949), the taxpayer executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" on a U. S. Treasury Form 874. However, unlike the facts in *Moore v. Cleveland Ry. Co., supra, Roos v. U.S., supra,* and *Diamond Alkali v. Driscoll, supra,* the Commissioner did not issue a notice of deficiency. It was contended by Associated Mutuals that the waiver was ineffective because it was filed before a notice of deficiency was issued.

Citing the *Moore, Roos,* and *Diamond Alkali* cases, *supra,* as authority and emphasizing the words "at any time" found in subsection (d) of Section 272, the Court held that such waivers eliminated the requirement that a notice of deficiency be issued and precluded appeal to the Tax Court. Since the previous material shows that the opinion in *Roos v. U.S., supra,* actually adopted a contrary view and the reasoning of *Moore v. Cleveland Ry. Co., supra,* is subject to serious infirmities, it is only necessary to examine the independent supports of the *Associated Mutuals* opinion, *supra.*

After citing the above three cases, the First Circuit said at page 182:

> "Furthermore, the right is given the taxpayer by § 272(d) to 'wave the restrictions provided in subsection (a) of this section on the assessment and collection' of *a deficiency;* and reference back to § 272(a) discloses that the first of these 'restrictions', or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency." (Italics supplied)

First, the Court is asked to note that the above quotation from

subsection (d) of Section 272 stops after the word "collection" and substitutes for the actual qualifying phrase "the deficiency" the words "a deficiency." Thus, when in the clause following the semi-colon the First Circuit makes a "reference back" to subsection (a) of Section 272 to ascertain the nature of the "restrictions", it avoids the necessity of also making a "reference back" to subsection (a) of Section 272 to ascertain the meaning of "the deficiency."

Secondly, is it a fair reading of subsection (a) of Section 272 to say that the Commissioner's duty to determine a deficiency and issue notice of "such deficiency" is a "restriction" on the assessment and collection of the whole or any part of the deficiency? It would seem more accurate to hold that it is the third sentence of § 272(d) which contains the restrictions which are applicable if the Commissioner does not perform his duty of determining a deficiency and issuing a notice of such deficiency. Actually the first and second sentences of Section 272(a) establish the method by which a taxpayer is given the right to appeal to the Tax Court. In fact that was the original purpose of Section 272(a) since it originally became a part of the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[14] Therefore, to say that provisions providing for notice and an opportunity for appeal to the Board of Tax Appeals are "restrictions" against the assessment and collection of "a deficiency" is to put the cart before the horse. After all it was the waiver provision (Section 272(d)) which was the afterthought rather than vice versa. Section 272 does not have as its primary purpose the establishment of a waiver provision by which the Commis-

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[14] "Section 274(a): This subdivision provides for *notice* and *an opportunity* for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." (Italics supplied) H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

sioner is relieved of such duties as determining the deficiency and sending notice of such deficiency.

Consequently, when the First Circuit concluded that the duty to determine a deficiency and send notice of such deficiency was a "restriction" on the assessment and collection of *"a deficiency"*, it was not reading Section 272(d) or Section 272(a) correctly. In like fashion the First Circuit has, as demonstrated above, read Section 272(d) as though it did not contain the qualifying words "the deficiency", and has therefore not answered the question of how there can be a waiver of the restrictions on assessment and collection of the deficiency when none has been determined.

Following the above-quoted language, the First Circuit turned to the contention that the legislative history of Section 272 supports the view that waivers filed pursuant to Section 272(d) do not relieve the Commissioner of the duty of issuing a notice of deficiency thereby providing a basis for appeal to the Tax Court. In so doing, it set forth the language from the 1926 Senate Finance Committee's report, *supra*, p. 10, stating that the waiver provision did not take away "the right of the taxpayer to take the case to the Board."

In answer the opinion stated at page 183 that:

> "We have not discovered any subsequent legislative history which clarifies the *exact* meaning of this paragraph; . . ."

But what more is necessary? The meaning was perfectly clear to Judge Littleton who wrote the opinion in *Roos v. U.S., supra*, one of the cases cited by the United States as authority. Furthermore, what is unclear about the meaning of the 1926 Senate Finance Committee's report? Surely such plain language cannot be ignored on the ground that subsequent legislative history is necessary to clarify its exact meaning. Nor is the effect of the committee language avoided by labeling it an "obscure passage" as the First Circuit has done.

As a second answer to the 1926 Senate Finance Committee's report, *supra,* the opinion reasons as follows at page 183:

> (1) Congress provided that if a jeopardy assessment is made before a notice of deficiency has been issued, the Commissioner must nevertheless issue such a notice "so that the taxpayer may appeal to the Tax Court."
>
> (2) Therefore, it is "reasonable to suppose" that Congress would likewise have specifically imposed upon the Commissioner the duty to send a deficiency letter to preserve the taxpayer's right to appeal to the Tax Court if such had been the legislative intent.

In other words, the opinion says that the 1926 Senate Finance Committee's report, *supra,* providing that Section 274(d), Revenue Act of 1926, allowed waivers "but without taking away the right of the taxpayer to take the case to the Board" does not mean what it says because Congress specifically required a notice of deficiency in the case of a jeopardy assessment. Why? Because it is "reasonable to suppose" so.

The taxpayer submits that it is not necessary to rely upon "reasonable" suppositions when there is legislative history which sets forth categorically that the waiver subsection does not take away the right of a taxpayer to appeal to the Board of Tax Appeals. What Congress actually said certainly ought to carry more weight than "reasonable" suppositions based upon a separate provision dealing with an entirely different set of problems.

Finally, the opinion relies upon administrative practice, stating that the Revenue Acts subsequent to 1926 were passed by Congresses which must have been aware of the Commissioner's practice not to send deficiency notices if a waiver had been filed by the taxpayer. But the same considerations respecting that administrative practice argument advanced in *Moore v. Cleveland Ry. Co., supra,* are applicable here. Also, it is difficult to conclude that, although Congress was told in 1938 that the case law in-

validated waivers filed before a notice of deficiency, nevertheless, the legislative history sustains the notion that Congress approved an administrative practice which contravened the only reported decisions.

As a result of the foregoing material, it is submitted that *Associated Mutuals v. Delaney, supra,* is not to be preferred over *Mutual Lumber Co. v. Poe, supra.*

Randall v. Riddell

Not only does the case of *Randall v. Riddell,* S.D. Cal., decided February 7, 1952 (52-1 USTC ¶ 9207) offer nothing more than the previously examined cases, cited by the United States, but it is contrary to the decisions and opinions of the Ninth Circuit which sits above the District Court which decided the case. *Mutual Lumber Co. v. Poe, supra, and McCarthy Co. v. Commissioner, supra.*

Summary of Cases

The foregoing material reflects that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are the product of better reasoning and more accurate analysis of the statute.

IV
The Contentions of the United States

In addition to a variety of contentions based upon the notions expressed in *Moore v. Cleveland Ry. Co., supra, Roos v. U.S., supra,* and *Associated Mutuals v. Delaney, supra,* the Government has offered at least two new contentions. Turning to these first and then to the basis of its other arguments, the following is submitted.

The *Monge v. Smyth* Contention

At pages 26 through 28 of its brief, the United States reviewed the Ninth Circuit's decision in *Monge v. Smyth,* 229 F. 2d 361 (C.A. 9th, 1956), certiorari denied 351 U.S. 976, and stated at

pages 27 and 28 that "the views of the Ninth Circuit in the *Monge* case concerning the validity of a waiver appear equally applicable to the facts of the instant case, even though those views constituted 'dictum' (R. 69)." What this argument amounts to is that the Ninth Circuit, sitting en banc, should be reversed in the instant case because in an earlier case *(Monge v. Smyth, supra,)* sitting as a three judge court, it expressed contrary views in a part of its opinion which the Ninth Circuit, sitting en banc, said constituted dictum. Or to put it another way, the Government is contending that there is support for the reversal of the Ninth Circuit in this appeal because an earlier opinion in another case contains dictum which is in opposition to the views adopted by the entire Court here.

Since the meaning of *Monge v. Smyth, supra,* was fully argued in the Ninth Circuit and the Ninth Circuit has held here that the language relied upon by the United States was dictum, it would appear that a holding and opinion in the instant appeal which flatly contravenes the dictum should dispose of the matter. That is, the Ninth Circuit's decision and opinion in this case should be taken and read for what it is and says rather than for what it might have been or said had it adopted language which it held constituted dictum.

The "Unilateral Action" Argument

Throughout pages 8 and 22 of its brief, the Government argues that to sustain the Ninth Circuit would mean that a taxpayer, by "unilateral action" which he "can take at any time," could "stop the accrual of interest and yet not be bound by the waiver of restructions upon the assessment and collection of the deficiency."[15] But how can this reasoning be approved?

First of all, the Ninth Circuit did not hold here or in *Mutual Lumber Co.* and *McCarthy Co.* cases *supra,* that a taxpayer could stop the accrual of interest and yet not be bound by the waiver

[15] Brief for the United States, page 22.

of restrictions on assessment and collection. Instead it held that the waivers were premature and therefore invalid for all purposes if filed before the issuance of a notice of deficiency. By the same token, none of the cases cited by the United States so hold. Rather they hold that the waiver is valid to stop the accrual of interest even if filed before a notice of deficiency is issued. Thus, if the waiver is invalid because filed before a notice of deficiency is issued, the interest continues to run. On the other hand, if the waiver is valid whether or not a notice has been issued, the interest stops accruing.

What the United States has done here is create a "straw man" argument designed to paint the picture of a Government which can neither collect a tax nor charge interest thereon. This is simply not a correct statement of the holding of the Court below. Furthermore, even if it were, the picture is out of focus. All that the Commissioner would be required to do to avoid such a situation would be to determine the deficiency and send a notice of such deficiency before the waiver is filed. In such a case, the waiver would be valid and he could immediately assess and collect the determined deficiency.

The crux of the Commissioner's objections to the decision below will be found in the *real* reason for his insistence that he not be required to determine a deficiency and send notice of "such deficiency" before a Form 870 is deemed valid under Section 272 of the 1939 Internal Revenue Code. That reason is subdivision (f) of Section 272 which prohibits the determination of "any additional deficiency in respect of the same taxable year" if the taxpayer files a petition with the Tax Court. On the other hand, if the Commissioner can sustain the validity of a Form 870 without being required to issue a notice of deficiency, he can, for all practical purposes, avoid the prohibition of Section 272(f). This is so because the subject Form 870 states on its face that it is not a final closing agreement and does not preclude the assertion of further deficiencies. Thus, so long as the Form 870 is valid with-

out a notice of deficiency, the Commissioner can continue to assert additional tax "deficiencies" until the period of limitations has run. In short, the practice of the Commissioner insofar as Form 870's are concerned, allows him to bypass the prohibition of Section 272(f).

The Remaining Contentions

In addition to a series of statements of conclusion containing phrases such as "the manifest purpose of Section 272(d)"[16] or "we think that the language and purpose of Section 272(d) are clear",[17] the United States has offered, at page 17 of its brief, the statement that "it is a plausible inference" that the 1954 amendment to Section 272(d) was merely of a clarifying and declaratory nature and that Congress did not thereby imply that prior law required a notice of deficiency before a valid waiver could be filed. This effort to avoid the fact that Congress was aware of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* in 1938, but did not adopt an amendment proposed to nullify those decisions, is based partially upon 1954 committee reports.[18] These reports stated that "the only material change" made in the successor to Section 272 was made in subsection (b)(3) which has nothing to do with the waiver provision. However, the two committee reports do not state what is considered a "material" change. And since the language of Section 6213(d) of the Internal Revenue Code of 1954 did add the phrase "whether or not a notice of deficiency has been issued", it is apparent that the statutory language was changed. Possibly the Congress did not consider this change to be a "material" one.

Aside from the above legislative history contention, the United States contends, at page 21 of its brief, that:

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[16] Brief for the United States, page 10.

[17] Brief for the United States, page 11.

[18] H. Rep. No. 1337, 83d Cong., 2d Sess., p. A.405 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4552); Sen. Rep. No. 1622, 83 Cong., 2d Sess., p. 573 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5222).

(1) The "unqualified" terms of Section 272(d) provide the right to waive the "restrictions" of Section 272(a) "without limitation."

(2) Section 272(a) restricts the assessment and collection of *"a* deficiency" prior to the issuance of a notice of deficiency.

(3) The taxpayer's right to insist upon this restriction is clearly a right which may be waived.

This argument is virtually the same as that found in *Associated Mutuals v. Delaney, supra,* where the opinion made a reference back to Section 272(a) for purposes of ascertaining what the term "restrictions" meant, but not to give meaning to the words "the deficiency" also found in subsection (d) of Section 272. It is a contention that treats Section 272 as primarily a waiver section rather than one which establishes the duty of the Commissioner to determine a deficiency and send a notice of such deficiency. But to classify the duty of the Commissioner to determine a deficiency and send a notice of such deficiency as a "restriction" on assessment and collection is a misreading of Section 272(a) and (d). The "restrictions" imposed upon the Commissioner are found in the third sentence of Section 272(a). And the "restrictions" which may be waived are, as is set forth in Section 272(d), "the *restrictions* provided in subsection (a) of this section *on the assessment and collection* of the whole or any part of *the deficiency.*"

If it is necessary to read Section 272(d) as if the last two words were *"a* deficiency" rather than *"the* deficiency" and to read Section 272(a) as though the duty to determine a deficiency and send a notice thereof is a "restricion" on assessment and collection, then it is submitted that there is a serious weakness in the view that a waiver is valid even though no notice of deficiency has been sent. Certainly a statute which is "clear" in its support for the Government's position should not require such a reading to justify the desired reversal of the Ninth Circuit's decision be-

low. Nor would it be necessary to read the words "at any time" as though there were no qualifying words following them.

In like fashion, the administrative practice of the Commissioner should not be necessary to support a desired reading of the subject statutory language. If administrative practice, without legislative history which clearly shows that Congress approved of such administrative practice, is an important consideration, then very little that the Commissioner does is without support. This is so because all of the actions of his agents constitute administrative practice. Somehow or another, it does not make sense, even though the administrative practice contention is much in vogue, to say that the actions or opinions of one of the litigants, if repeated enough, acquire the status of legal authority itself.

Finally, the United States, at pages 22 and 23 of its brief, suggests that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are cases which are distinguishable, and that the decision below does not necessarily follow. The best answer to this argument is the answer which the Ninth Circuit gave to the government after the same contention was made below. The opinion (R. 68) said:

> "It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. *But the basic question is the same in all three cases* — was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit." (Italics supplied)

In view of this language, what point is there in attempting to distinguish the cases now? Certainly if the very court which decided

all three cases finds that they are not distinguishable, how could a litigant expect a higher court to reverse the Ninth Circuit partially on the ground that the cases are distinguishable?

CONCLUSION

If the Court should reverse the court below and direct that judgment be entered for the United States, the taxpayer will have been denied a hearing in any court on the merits of the tax assessed. The reason is that a judgment for the sum prayed for by the United States is res judicata for that taxable year. Since the complaint below was an effort to obtain judgment for an additional tax set forth in a U. S. Treasury Form 870, the only evidence relevant in such an action is whether the additional tax was properly assessed. It is of no concern to the District Court whether the asserted additional tax is correct or not since the taxpayer has signed a Form 870. And since the asserted additional tax has not been paid, the action does not constitute a refund suit wherein the correctness of the alleged additional tax would be determined by the District Court. Thus, when a Form 870 is considered valid without a prior or subsequent issuance of a notice of deficiency, the taxpayer cannot appeal to the Tax Court. His only remedy is to pay the tax and file a refund action in a U. S. District Court or the Court of Claims. But what happens, as it did here, if the taxpayer does not have the funds to pay the additional tax during the six year period during which the Commissioner may collect the sum, and the United States files an action seeking judgment for the amount set forth in the Form 870 remaining unpaid? In such a case, the taxpayer, if the waiver is deemed valid, has judgment rendered against him without ever having had an opportunity to have a court review the correctness of the asserted additional tax. Since such a problem arises only in the case of a taxpayer who cannot pay the additional tax thereby requiring the United States to obtain a judgment, the taxpayer is in an economic condition likely to encourage the signing of a Form 870 or any other form.

Whether it is desirable that such a result be reached upon the basis of a waiver form which does not even tell the taxpayer that he is waiving his right to appeal to the Tax Court is a matter for the Court to decide. It is true that some members of the legal profession are aware that the execution of a Form 870 may result in a waiver of a right to appeal to the Tax Court, but should not the Form 870 tell the taxpayer who is not represented by counsel that he is waiving a right to appeal to the Tax Court? Also, is it good law to find that a taxpayer may waive a right before he has obtained that right?

For the reasons stated, the judgment should be sustained.

Respectfully submitted,

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